

NO. 76630-9

---

**COURT OF APPEALS, DIVISION I**  
**OF THE STATE OF WASHINGTON**

---

Freedom Foundation,

Appellant,

v.

University of Washington,

and

Service Employees International Union Local 925,

Respondents.

---

**RESPONSE BRIEF OF UNIVERSITY OF WASHINGTON**

---

ROBERT W. FERGUSON  
Attorney General

Robert W. Kosin, WSBA 28623  
Nancy S. Garland, WSBA 43501  
Assistant Attorneys General  
Office ID 91135  
University of Washington Division  
4333 Brooklyn Avenue NE, Floor 18  
UW Box 359475  
Seattle, WA 98195-9475  
(206) 543-4150  
rkosin@uw.edu : nancysg@uw.edu

## TABLE OF CONTENTS

I.	INTRODUCTION .....	1
II.	ISSUES PRESENTED .....	2
III.	STATEMENT OF THE CASE .....	3
IV.	ARGUMENT .....	6
	A. The Foundation’s Appeal of the Trial Court’s Temporary Restraining Order, Preliminary Injunction and Denial of Reconsideration Are Mooted by the Trial Court’s Entry of a Permanent Injunction .....	6
	B. The Standard of Review in Public Records Cases Is De Novo.....	7
	C. The Public Records Act Mandates Public Access to Non- Exempt Public Records.....	7
	1. The term “public record” is broadly defined in the Public Records Act .....	8
	2. A public record is a writing that relates to the conduct of government or the performance of a proprietary function that is prepared, owned, used or retained by an agency .....	9
	D. If the Records at Issue “Relate to the Conduct of Government or the Performance of Any Governmental or Proprietary Function,” the Records Are Public Records .....	13
V.	CONCLUSION .....	16

## TABLE OF AUTHORITIES

### Cases

<u>Ameriquet Mortg. Co. v.</u> <u>Office of the Att’y Gen. of Washington,</u> 177 Wn.2d 467, 300 P.3d 799 (2013).....	7, 13
<u>Belenski v. Jefferson County,</u> 187 Wn. App. 724, 350 P.3d 689 (2015) <u>rev’d in part on other grounds,</u> 186 Wn.2d 452, 378 P.3d 176 (2016).....	11
<u>Burt v. Dep’t of Corrections,</u> 168 Wn.2d 828, 231 P.3d 191 (2010).....	7
<u>City of Federal Way v. Koenig,</u> 167 Wn.2d 341, 217 P.3d 1172 (2009).....	7
<u>Dragonslayer, Inc. v. State Gambling Comm’n,</u> 139 Wn. App. 433, 161 P.3d 428 (2007).....	8
<u>Jane Does v. King County,</u> 192 Wn. App. 10, 366 P.3d 936 (2015).....	11
<u>John Doe G v. Dep’t of Corrections,</u> 197 Wn. App. 609, 391 P.3d 496 (2017).....	6
<u>Neigh. All. of Spokane County v.</u> <u>County of Spokane,</u> 172 Wn.2d 702, 261 P.3d 119 (2011).....	7
<u>Nissen v. Pierce County,</u> 183 Wn.2d 863, 357 P.3d 45 (2015).....	11
<u>O’Neill v. City of Shoreline,</u> 170 Wn.2d 138, 240 P.3d 1149 (2010).....	8
<u>Progressive Animal Welfare Soc’y v.</u> <u>Univ. of Washington,</u> 125 Wn.2d 243, 884 P.2d 592 (1995).....	12

<u>Tiberino v. Spokane County,</u> 103 Wn. App. 680, 13 P.3d 1104 (2000) .....	13, 14
<u>Tyler Pipe Indus., Inc. v. Dep’t of Revenue,</u> 96 Wn.2d 785, 638 P.2d 1213 (1982).....	7, 13
<u>Yakima Newspapers, Inc., v. City of Yakima,</u> 77 Wn. App. 319, 890 P.2d 544 (1995) .....	11

**Statutes**

RCW 7.40 .....	1, 2, 7, 15, 16
RCW 40.14 .....	8
RCW 40.14.010 .....	9
RCW 41.76 .....	3
RCW 42.56 .....	1, 2
RCW 42.56.010(3).....	4, 8, 11, 16
RCW 42.56.030 .....	8
RCW 42.56.060 .....	12
RCW 42.56.540 .....	2, 4, 15

## **I. INTRODUCTION**

The King County Superior Court entered a permanent injunction protecting certain emails among four University of Washington (University) faculty members and/or with a union that were created and retained on the University's email system purportedly in connection with the union's campaign to organize the University faculty. The records were sought from the University under the Public Records Act (PRA), RCW 42.56, by the Freedom Foundation (Foundation), which appeals the order of injunction and requests this Court decide whether emails reflecting conversations among the University faculty and the union constitute "public records" within the meaning of the PRA.

On March 27, 2017, the Superior Court granted Service Employees International Union 925's (SEIU 925 or union) motion for summary judgment and entered a permanent injunction under RCW 7.40 enjoining the University from releasing identified records to the Foundation pursuant to the PRA. The court found that the records were not public records within the meaning of the PRA, and that SEIU 925 had met the criteria for an injunction under RCW 7.40. The Foundation appealed.

The University initially proposed to release the records and provided notice to the University faculty and SEIU 925 as permitted by

RCW 42.56.540. SEIU 925 sought injunctive and declaratory relief in King County Superior Court to prevent the release of the records to the Foundation, arguing the records were not “public records” and that the union and public employees would suffer irreparable harm if the records were released. In its complaint, SEIU 925 also alleged that the University committed an unfair labor practice by proposing to release the records to the Foundation. The Foundation opposed the injunction. The University opposes the unfair labor practice, and has remained ready to release the records under the PRA or as directed by the court.

## **II. ISSUES PRESENTED**

1. Whether email records between and among members of the University faculty and a union that purportedly reflect their public employee organizing activities are “public records” within the meaning of the Public Records Act when they are “retained” on the University’s email servers.

2. Whether the records should be protected from disclosure by injunction under RCW 7.40 if the records are not “public records;” or, whether they should be enjoined from release under RCW 42.56 if they are “public records.”

3. Whether the Foundation’s appeal of the trial court’s preliminary injunction orders dated June 10 and August 5, 2016, and its order denying reconsideration dated August 12, 2016, is moot.

### III. STATEMENT OF THE CASE

In late 2015, the Foundation submitted a PRA request to the University requesting records in the possession of the University that were sent or received by four members of the University faculty<sup>1</sup> that contained specified terms, including “Freedom Foundation,” “SEIU,” and “[u]nion,” among others. CP at 39. The Foundation’s request also sought emails that were sent or received from certain email addresses or email addresses ending in certain domains (e.g., @seiu925.org). CP at 39. At the time of the request, SEIU 925 was conducting a campaign on the University campuses to organize the faculty to form a public employee bargaining unit pursuant to RCW 41.76.<sup>2</sup> See, e.g., CP at 96, 100.

Compliance Staff from the University Office of Public Records and Open Public Meetings (OPR) contacted the faculty, including Professor Robert Wood, and asked each of them to search for records responsive to the request. CP at 219. Professor Wood forwarded a set of records to OPR, which began to review them for applicable exemptions under the PRA. CP at 219-20. The University found no basis for determining that the

---

<sup>1</sup> The four employees are Professor Robert Wood, Lecturer James Liner, Principal Lecturer Adam Katz, and Professor Amy Hagopian. All are faculty members at the University.

<sup>2</sup> SEIU 925 has not been certified by the Public Employment Relations Commission as the exclusive representative of the University faculty for the purposes of collective bargaining under RCW 41.76.

records requested by the Foundation fell clearly outside the definition of “public records” in RCW 42.56.010(3) or that the records were exempt from disclosure under any statutory provision. CP at 220. Other than certain exemptions claimed by the University, which related mainly to student privacy and are not at issue in this appeal, the University could find no basis for withholding the records. CP at 220.

However, the University also recognizes there are cases in which an interested party may be able establish an exemption from disclosure that the University would not have the standing to argue, e.g., an individual right to privacy or a constitutional right or privilege. On or about April 12, 2016, OPR notified Professor Wood that the University intended to release the requested records to provide an opportunity for him or SEIU 925 to seek injunctive relief, as provided in RCW 42.56.540. CP at 102, 120-21, 220. The notice was related to the “Stage 1” proposed release comprising approximately 3,913 pages of emails and attachments collected by OPR. CP at 220. The notice indicated that unless a court order enjoining release of Stage 1 was provided to OPR by close of business on April 26, 2016, the records would be released the next day. CP at 120-21. Before the deadline, based on a proposal by the Foundation, the parties agreed that SEIU 925 would not seek a temporary restraining order and instead would agree to set a preliminary injunction hearing and briefing schedule, the Foundation



would agree not to seek disclosure of the requested records and agreed to waive claims against the University for penalties and attorney fees for the time period between the agreement and the hearing, and the University would agree not to release the requested records to the Foundation pending the outcome of the preliminary injunction hearing. CP at 62-64.

The Court held a preliminary injunction hearing and entered a temporary restraining order on June 10, 2016. CP at 267-70. The Court held a second preliminary injunction hearing on August 5, 2016, and entered a preliminary injunction on that date.<sup>3</sup> CP at 291-98.

The Court heard SEIU 925's motion for summary judgment and for permanent injunction on March 24, 2017, and on March 27, 2017, entered its order permanently enjoining release of the emails. CP at 686-97. See generally RP. The permanent injunction was entered prior to the date for the hearing on the alleged unfair labor practice. CP at 721. The Foundation filed its Notice of Appeal in the trial court within hours.

SEIU 925 subsequently moved the trial court to continue its hearing on the unfair labor practice charges pending the outcome of this Court's decision in this appeal. CP at 717-22. The Foundation opposed the union's motion on jurisdictional grounds and sought sanctions against the union for

---

<sup>3</sup> The trial court entered its order of preliminary injunction on August 5, 2016, but the parties did not immediately agree on the text for a written order, which the court ultimately signed on September 23, 2016.

filing the motion. CP at 723-809. The trial court granted the union's motion to continue the unfair labor practice charges pending this appeal and denied the Foundation's motion for sanctions. CP at 844-57. The Foundation appeals those rulings as well. CP at 858-75.

#### **IV. ARGUMENT**

##### **A. The Foundation's Appeal of the Trial Court's Temporary Restraining Order, Preliminary Injunction and Denial of Reconsideration Are Mooted by the Trial Court's Entry of a Permanent Injunction**

In its notice of appeal filed March 27, 2017, the Foundation appealed the Order Granting Summary Judgment and Permanent Injunction entered that same day, as well as three orders that were issued in late summer and fall of 2016 that the Foundation failed to appeal at any time prior. The trial court issued appealable orders after each of those hearings, and the Foundation failed to file notices of appeal or for discretionary review after any of them. The temporary restraining order, order of preliminary injunction, and corresponding denial of reconsideration have all merged into the order for permanent injunction and any questions as to the propriety of the entry of those orders are now moot. John Doe G v. Dep't of Corrections, 197 Wn. App. 609, 629, n.76, 391 P.3d 496 (2017) (citing State ex rel. Carroll v. Simmons, 61 Wn.2d 146, 149, 377 P.2d 421 (1962)).

Accordingly, the Court should decline to address the Foundation's arguments in connection with the temporary and preliminary orders.

**B. The Standard of Review in Public Records Cases Is De Novo**

Courts review de novo public records cases that are decided purely on affidavits. City of Federal Way v. Koenig, 167 Wn.2d 341, 217 P.3d 1172 (2009). Interpretations of law and orders granting summary judgment are similarly reviewed de novo. Neigh. All. of Spokane County v. County of Spokane, 172 Wn.2d 702, 715, 261 P.3d 119 (2011).

In a PRA case, the party arguing that records should not be disclosed—here SEIU 925—bears the burden of proof. Ameriquet Mortg. Co. v. Office of the Att’y Gen. of Washington, 177 Wn.2d 467, 486, 300 P.3d 799 (2013) (Ameriquet II). A party seeking an injunction under RCW 7.40 also bears the burden of proof. Tyler Pipe Indus., Inc. v. Dep’t of Revenue, 96 Wn.2d 785, 792, 638 P.2d 1213 (1982).

**C. The Public Records Act Mandates Public Access to Non-Exempt Public Records**

The PRA is a strongly-worded mandate for open government that provides the public access to public records. Burt v. Dep’t of Corrections, 168 Wn.2d 828, 832, 231 P.3d 191 (2010). “Agencies are required to disclose any public record upon request unless it falls within a specific, enumerated exemption.” Neigh. All., 172 Wn.2d at 714 (citing

RCW 42.56.070(1)). The PRA must be liberally construed and its exemptions narrowly construed. RCW 42.56.030. However, “[t]he PRA applies only to public records.” O’Neill v. City of Shoreline, 170 Wn.2d 138, 146, 240 P.3d 1149 (2010). The primary issue on appeal is whether the requested records are “public records” within the meaning of the PRA.

**1. The term “public record” is broadly defined in the Public Records Act**

A “public record” is “[ (1) ] any writing [ (2) ] containing information relating to the conduct of government or the performance of any governmental or proprietary function [ (3) ] prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.” RCW 42.56.010(3) (emphasis added). Courts have broadly interpreted the definition of public record. O’Neill, 170 Wn.2d at 147 (“‘public record’ is defined very broadly, encompassing virtually any record related to the conduct of government”). “All three elements of this three-prong test must be satisfied for a record to be a public record.” Dragonslayer, Inc. v. State Gambling Comm’n, 139 Wn. App. 433, 444, 161 P.3d 428 (2007). The definition is not limited to records that transact<sup>4</sup>

---

<sup>4</sup> The legislature knew well how to draft a more limited definition. In RCW 40.14, the Preservation and Destruction of Public Records, public records is defined in a more limited manner “[a]s used in this chapter, the term ‘public records’ shall include any paper, correspondence, completed form, bound record book, photograph, film, sound recording, map drawing, machine-readable material, compact disc meeting current industry ISO

agency business but rather captures records that relate to the conduct of government or the performance of any governmental or proprietary function of government.

**2. A public record is a writing that relates to the conduct of government or the performance of a governmental or proprietary function that is prepared, owned, used or retained by an agency**

Only the second element of the definition of public record is at issue in this case: whether the emails “relate to” “the conduct of government” or “the performance of any governmental or proprietary function.” No party disputes that the emails at issue in this case are writings, or that they were created and/or retained on the servers owned and operated by the University, a state agency. University policy provides that email should be used in the furtherance of the University’s teaching, research, service and administrative functions. CP at 653-60. The policy provides also that there is no expectation of privacy while using email. CP at 654-55.

At the same time, the University of Washington is an internationally recognized research institution with tens of thousands of employees, faculty, and staff working and studying in nearly every area of academic or

---

specifications, or other document, regardless of physical form or characteristics, and including such copies thereof, that have been made by or received by any agency of the state of Washington in connection with the transaction of public business . . .” RCW 40.14.010 (emphasis added). Comparing the two definitions, it is apparent that an agency may be required to disclose and produce for public inspection records the agency is not required by law to retain.

scientific inquiry. The communications and records created by this vast and diverse group of individuals span untold topics and are not easily categorized. Even if a person sending or receiving emails using the University system were able to make a valid claim that particular emails in fact do not relate to the conduct of government or the performance of any governmental or proprietary function, it may be difficult to differentiate these from records that did relate to the conduct of government or performance of a proprietary function given the breadth of the University's activities. OPR could find no clear basis to withhold the records—that is, they did not clearly fall outside the definition of public record, and were not clearly exempt. Consistent with the PRA's public policy favoring disclosure, the University proposed to release the records—but consistent with the PRA the University also provided notice to the faculty named in the record request.

SEIU 925 argued below that the emails are not “public records,” but rather are the personal or private records of the faculty members and the union. The Foundation argued below that the records are “public records” and must be disclosed. The University did not find a basis on which to determine that the requested records fell outside the statutory definition of public record, and in the trial court below did not advocate either position.

Accordingly, to determine whether the requested records are “public records” within the meaning of the PRA, this Court must determine whether the emails “relate to” “the conduct of government” or “the performance of any governmental or proprietary function.” Courts broadly interpret this element of RCW 42.56.010(3). Belenski v. Jefferson County, 187 Wn. App. 724, 350 P.3d 689 (2015) (citing Confederated Tribes of Chehalis Reservation v. Johnson, 135 Wn.2d 734, 746, 958 P.2d 260 (1998)), rev’d in part on other grounds, 186 Wn.2d 452, 378 P.3d 176 (2016). This broad construction is deliberate and meant to give the public access to information about every aspect of state and local government. Nissen v. Pierce County, 183 Wn.2d 863, 874, 357 P.3d 45 (2015) (citing Laws of 1973, ch. 1, § 1(11)).

Public records are not limited to records showing direct governmental action but rather the definition “uses broad language to capture information relating to the conduct of government or the performance of any governmental or proprietary function[.]” Jane Does v. King County, 192 Wn. App. 10, 22-23, 366 P.3d 936 (2015) (internal quotations omitted). Because employment is a proprietary function of government, Yakima Newspapers, Inc., v. City of Yakima, 77 Wn. App. 319, 324, 890 P.2d 544 (1995), the University was unable to determine that the records requested by the Foundation clearly are not “public records”

under RCW 42.56.010(3), or that they were exempt under the PRA or another statute. Consistent with the PRA's mandate for openness, the University therefore chose to prepare to release the records and provide notice to the professor.

Both the union and the Foundation argued in the trial court that the University was required to determine which, if any, records were public records and which were not. CP at 349, RP at 13. However, neither party was able to provide any legal authority of a public agency's legal obligation to withhold records that are arguably outside the definition of public records.

Moreover, nothing in the PRA imposes a legal obligation on an agency to withhold a non-public record; to the contrary, the PRA's public policy favoring disclosure in many ways requires agencies to err on the side of disclosure. The policy is reinforced by the PRA's penalty provisions, under which agencies can be heavily penalized for improperly withholding records and be ordered to pay the requestor's attorney fees. Progressive Animal Welfare Soc'y v. Univ. of Washington, 125 Wn.2d 243, 270, 884 P.2d 592 (1995). Additionally, the legislature sought to strongly encourage agencies to produce agency-held records to the public by providing immunity to agencies that disclose public records in good-faith efforts to comply with the Act. RCW 42.56.060 ("No public agency, public official,



public employee, or custodian shall be liable, nor shall a cause of action exist, for any loss or damage based upon the release of a public record if the public agency, public official, public employee, or custodian acted in good faith in attempting to comply with the provisions of this chapter.”).

**D. If the Records at Issue “Relate to the Conduct of Government or the Performance of Any Governmental or Proprietary Function,” the Records Are Public Records**

The records at issue are not in the record and were not reviewed in camera in the trial court. Instead, SEIU 925 provided declarations to the trial court categorizing the records into several non-exclusive categories. The union argued that all but one of these categories were non-public records.<sup>5</sup> The trial court relied on the declarations submitted by the union as underlying support for its determination that the records were not public records and that disclosure would cause irreparable injury.

The burden to establish a basis to withhold these records is on the union. Ameriquet II, 177 Wn.2d at 486; Tyler Pipe, 96 Wn.2d at 792.

SEIU 925 submitted declarations categorizing the records. In reviewing those declarations, the trial court relied on Tiberino v. Spokane County, 103 Wn. App. 680, 13 P.3d 1104 (2000), to determine that Professor Wood’s emails were not public records. CP at 693-94. In

---

<sup>5</sup> Records identified by SEIU 925 as public records were subsequently released by the University, and are not at issue on this appeal. CP at 641-42.

Tiberino, a County employee was terminated for excessive use of the County's email to communicate with family and friends for personal purposes. The local newspaper made a public records act request to the County for the employee's email and the employee sought injunctive relief from the court. The trial court denied the injunction and the employee appealed. On appeal, the court held that the employee's emails were related to a proprietary function of government, employment, because the County printed and used them in preparing for litigation over her termination. Tiberino, 103 Wn. App. at 688. The Tiberino court did not hold that "purely personal" emails can never be "public records" within the meaning of the PRA. In fact, the Court's analysis of the personal nature of the employee's email is not material until its discussion of whether the emails might be exempt. Id. Ultimately, the Court held that the substance of Ms. Tiberino's emails should be exempt because disclosure would violate her right to privacy and the content was not of legitimate public concern, but required the redacted emails to be disclosed because her termination—related to the proprietary function of employment—was based on excessive personal use of email. Tiberino, 103 Wn. App. at 689-91.

In this case, the University initially found no basis for determining it could withhold the requested records. In the trial court, the union submitted declarations grouping the emails into categories. The trial court

determined that the emails, as described by those categories, did not relate to the conduct of government or the performance of a governmental or proprietary function and entered a permanent injunction protecting the records from disclosure, which the Foundation appealed.

Thus, the initial question on appeal is whether the emails described in the union's declarations relate to the conduct of government or the performance of a proprietary function of government; if so, the emails are public records. If this Court concludes the emails are public records, the Court should then turn to determining whether the union has proven a basis to exempt them categorically or in part under RCW 42.56.540 and exemptions contained in the PRA and other statutes, or remand to the trial court to address those questions. If this Court concludes the emails are not public records, the analysis then turns to whether union has proven a basis to withhold them categorically or in part by injunction under RCW 7.40.

//

//

//

//

//

//

//

## V. CONCLUSION

This Court is asked to determine whether the trial court correctly concluded that the records at issue here are not “public records” under RCW 42.56.010(3), and that they should be permanently enjoined from release under RCW 7.40.

RESPECTFULLY SUBMITTED this 26th day of July 2017.

ROBERT W. FERGUSON  
Attorney General

*s/Robert Kosin*  
*s/Nancy S. Garland*  
Robert W. Kosin, WSBA 28623  
Nancy S. Garland, WSBA 43501  
Assistant Attorneys General  
Office ID 91135  
University of Washington Division  
4333 Brooklyn Avenue NE, Floor 18  
UW Box 359475  
Seattle, WA 98195-9475  
(206) 543-4150  
rkosin@uw.edu : nancysg@uw.edu

### **CERTIFICATE OF SERVICE**

I hereby certify under penalty of perjury under the law of the State of Washington that on July 26, 2017, I filed with the Court of Appeals, Division I of the state of Washington by E-filing and I served by email the foregoing document and this certificate of service on:

Counsel for SEIU 925:

Kristen Kussmann	kkussmann@qwestoffice.net
Jacob Metzger	jmetzger@qwestoffice.net
Paul Drachler	pdrachler@qwestoffice.net
Douglas Drachler McKee & Gilbrough LLP	
1904 Third Avenue, Suite 1030	
Seattle, WA 98101	
(206) 623-0900, x229	

Counsel for Freedom Foundation:

Stephanie D. Olson	solson@freedomfoundation.com
c/o Freedom Foundation	
P.O. box 552	
Olympia, WA 98507	
(360) 956-3482	

Dated this 26th day of July 2017, at Seattle, Washington.

*s/ Jennifer A. Lee*  
Jennifer A. Lee  
Legal Assistant

# UW DIVISION OF ATTORNEY GENERAL'S OFFICE

July 26, 2017 - 4:34 PM

## Transmittal Information

**Filed with Court:** Court of Appeals Division I  
**Appellate Court Case Number:** 76630-9  
**Appellate Court Case Title:** Freedom Foundation, Appellant v. Service Employees International Union Local 925, Respondents  
**Superior Court Case Number:** 16-2-09719-7

### The following documents have been uploaded:

- 766309\_Briefs\_20170726161852D1416978\_4391.pdf  
This File Contains:  
Briefs - Respondents  
*The Original File Name was 2017-07-26 UW Response FINAL.pdf*

### A copy of the uploaded files will be sent to:

- dahle@uw.edu
- doirom@uw.edu
- enotify@uw.edu
- jeaniec@uw.edu
- jmetzger@qwestoffice.net
- kkusssmann@qwestoffice.net
- leeja33@uw.edu
- nancysg@uw.edu
- pdrachler@qwestoffice.net
- solson@myfreedomfoundation.com

### Comments:

---

Sender Name: Jennifer Lee - Email: leeja33@uw.edu

**Filing on Behalf of:** Robert W. Kosin - Email: rkosin@uw.edu (Alternate Email: )

Address:  
UW MS 359475  
4333 Brooklyn Avenue NE  
Seattle, WA, 98195-9475  
Phone: (206) 543-4150

**Note: The Filing Id is 20170726161852D1416978**